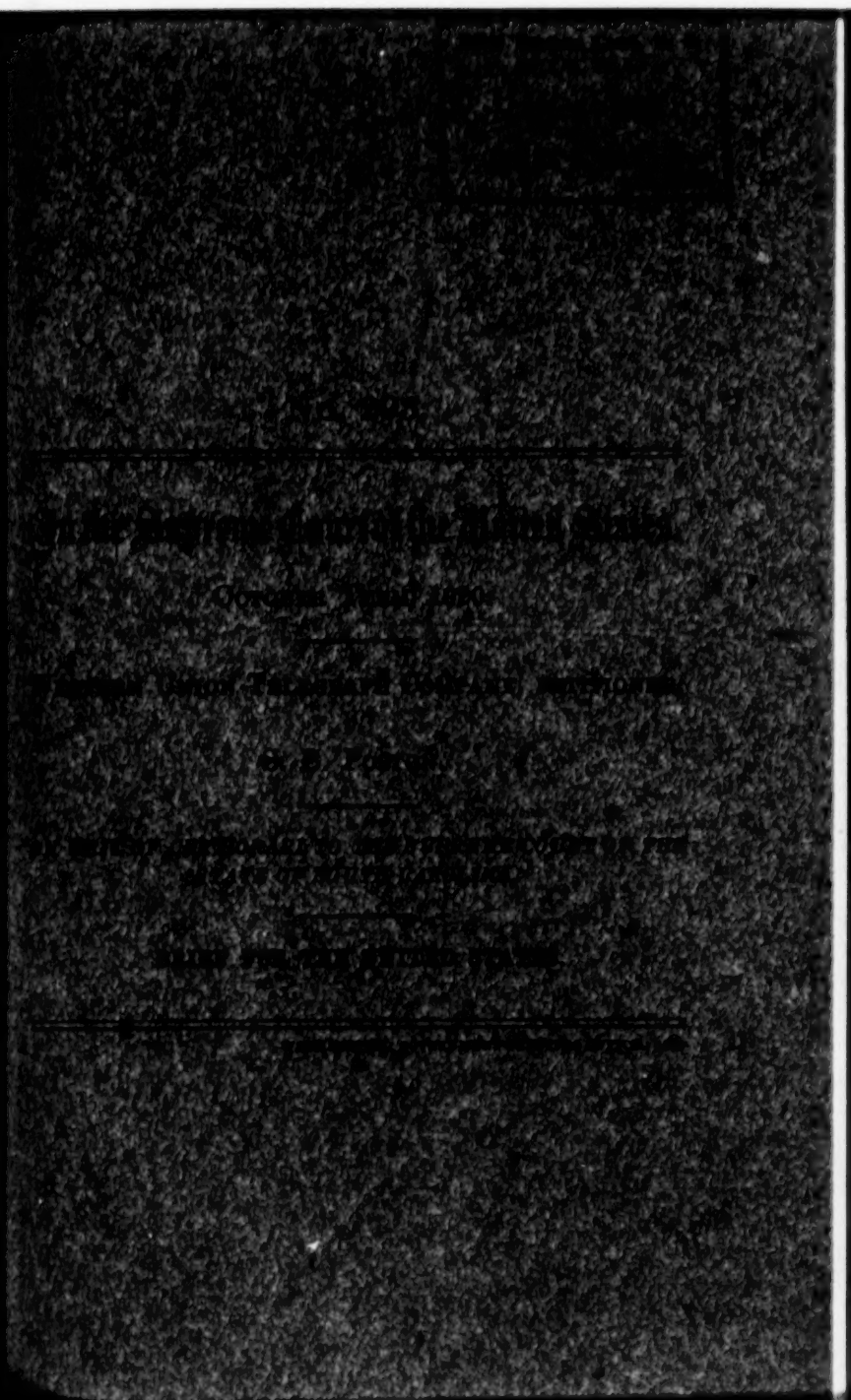


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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

WESTERN UNION TELEGRAPH COMPANY,	}	No. 293.
Petitioner,		
v.		
S. B. POSTON.		

*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF SOUTH CAROLINA.*

BRIEF FOR THE UNITED STATES.

The question in this case is whether a suit may be maintained against the Western Union Telegraph Company to recover damages occasioned by delay in sending a telegram over the wires of that company after its lines had been taken over by the President pursuant to the joint resolution of Congress and were being operated by the Postmaster General. The company is defending on the ground that since it was not operating its lines it was not a party to any contract to transmit the message or responsible for the negligence of those acting for the Postmaster General.

The United States is directly interested in the result of the suit, for the reason that, as a war measure, the telegraph company was taken over by the President and its lines were being operated under his authority by the Postmaster General. Under the terms of the joint resolution of Congress, the

telegraph company was to be paid fair compensation. In pursuance of this requirement, the Postmaster General entered into a contract to pay such compensation, and, as a part of this compensation, agreed to "save the owner harmless from all judgments or decrees that may be recovered or issued against and all fines and penalties that may be imposed upon it by reason of any cause of action arising out of Federal control or anything done or omitted in the possession, operation, use, or control of its property during the period of Federal control, except judgments or decrees founded on obligations of the owner to the Postmaster General of the United States." (Rec., p. 46.) If, therefore, the telegraph company is subject to be sued for causes of action arising from the operation of its lines by the Postmaster General, the Government will, of course, be confronted with the claim that it must reimburse the company for all amounts which it shall be compelled to pay as the result of judgments that may be obtained against it as well as for all expenses incurred by it in the successful defense of such cases. It is a matter of importance to the Government, therefore, that suits thus resulting in a liability against it shall not be maintained unless it can be said that the legislation under which the telegraph lines were taken over and operated authorizes such suits.

The questions involved have been so fully and conclusively briefed by counsel for the petitioner that but little remains to be said.

BRIEF.**I.**

Nothing else appearing, it is safe to say that one person can not be held responsible for the acts of another over whom he has no control and who is not acting for him.

It is axiomatic, of course, that no one can be held liable except for his own acts or the acts of some one else who, in some respect, is acting for him or under his control, direction, or authority. The brief of counsel for the petitioner demonstrates beyond the shadow of a doubt that the taking over of the telegraph lines by the President was complete and took all control of the operation of these lines away from the owners. In other words, after this taking over, the lines were operated for and on behalf of the United States, the revenues derived accrued to the United States, and the former agents and employees of the telegraph companies became the agents and employees of the Postmaster General, acting for the United States, and were subject alone to his control and direction. The authorities cited by counsel for the petitioner establish all this clearly. The question then is whether the companies owning the telegraphs, which were entitled merely to receive compensation for their use by the United States, can be held liable either for breach of contract or negligence on the part of those employed by the United States to operate them. Manifestly, there can be but one answer to this question, unless the acts of Congress under which the

Government was operating change what would otherwise undoubtedly be the rule.

II.

Congress in providing for taking over telegraph lines had ample power to provide either that the Government should operate them subject to the same liabilities to which the companies if operating them would be liable, or that they should be operated without subjecting the Government to any liability except the payment of fair compensation for their use.

Service to the public in the way of transporting passengers or freight, handling the mail, or transmitting messages, may be rendered either directly by the Government or through public-service corporations. If the service is permitted to be performed by the latter, their liabilities to the public are fixed by the prevailing rules of law. If, however, the Government chooses to itself render the service it may do so on such terms as Congress sees fit to make. Congress may, if it thinks proper, make the Government subject to the same liabilities that a corporation would be subject to in performing the same service and may provide the method for enforcing such liabilities. On the other hand, Congress may authorize the Government to provide such service without incurring any liability whatever to the public. In the case of the Government, moreover, no such liability can be enforced unless Congress has expressly given consent for the Government, or some one representing it, to be sued. From these general statements it is presumed there can be no dissent.

III.

Heretofore, so far as the Government has rendered service to the public, it has done so without assuming the liabilities to which a corporation rendering the same service would be subject.

The rendering of service by the Government to the public without assuming liability for the acts or omissions of its agents is nothing new. The Government has, from the beginning, rendered the service of transmitting for the public from place to place letters and other articles carried in the mails. It demands compensation of all who avail themselves of this service. It has never been thought necessary or proper however, that, on account of demanding this compensation, or for any other reason, it should be held responsible for the loss of valuables or other things from the mails or even for their theft. In other words, it renders the service and the public takes the risk of loss resulting from the negligence or dishonesty of the agents of the Government. No instance is now recalled, prior to the recent taking over of the railroads of the country, in which the Government has seen fit, with respect to any public service it rendered, to assume the same liabilities that a corporation would assume in rendering the same service. If, therefore, Congress saw fit to authorize the Government, as a war measure, to take over the telegraph lines of the country and to operate them with the same freedom from liability that it has always enjoyed in handling the mails, there is no legal ground on which anyone can complain. Indeed, when we

contemplate the very great sacrifices which the public may and must be called upon to make for the successful prosecution of a war, the mere foregoing of the opportunity to send telegraph messages through the medium of some person or company who may be held responsible for their negligent transmission is too insignificant to be of serious consequence. The question, therefore, is whether Congress has expressed an intention that the right to maintain suits such as the present one shall be preserved during the period of Federal control.

IV.

Right to sue reserved by legislation taking over the railroads.

When Congress, during the war, found it necessary that the railroads should be operated by the Government it saw fit to depart from the usual policy that, in rendering public service, the Government should be free from liability for negligence. It therefore very clearly enacted that the operation of the railroads should be on condition that the liabilities attaching to the railroad companies should continue under Government operation. Apparently, it was felt that the dangers incident to railroad operation were such that the individuals suffering from them should have the same protection which they had in times of peace. For this reason, it was expressly provided that, during Federal control, suits might be brought against the companies as before. Of course, any judgments so obtained were

to be ultimately paid by the Government. In effect, then, it was provided that the Government should be subject to the usual liabilities attaching to the operation of railroads by corporations and that this liability might be enforced by suits against the railroad companies themselves. In other words, the right to maintain these suits in this way was given as a means of enforcing a liability against the United States. Under this construction the act would doubtless be held constitutional. Under any other construction, as demonstrated in the brief for petitioner, it will probably be unconstitutional. The point now made is that when Congress concluded that the operation of the railroads should be subject to the usual liabilities, it expressly so provided.

V.

In authorizing the taking over of the telegraph lines Congress did not provide for a continuance during Federal control of the usual liabilities of telegraph companies.

Later, when Congress found it necessary to authorize the taking over of the telegraph lines it was fresh from a consideration of the matters which had led it to require Federal operation of railroads to be subject to the usual liability. It omitted, however, to make any provision for the continuation of such liabilities in the case of telegraph lines. The conclusion is irresistible that this omission was intentional and deliberate. Congress had the option to require the Government to operate the telegraph lines subject to liability just as it was

operating the railroads, or to operate them without liability just as it had always handled the mails. Plainly the sending of messages by wire was much more like sending messages by mail than it was like operating a system of railroads. Congress, therefore, simply authorized the taking over and operation of the telegraph lines, and thereby authorized the Government to carry on that business in the same manner and with the same freedom from liability that it carried on the business of handling the mails. If the carrying on of the telegraph business was to be classed either with the railroad business or with the business of handling the mails, the latter was by all means the more logical and natural classification. No real ground of complaint can exist because, during the period of the war, the Government undertook the transmission of messages both by wire and by the mails and refused, in either case, to make itself liable for the negligence of those whom it must employ for that purpose.

CONCLUSION.

What has been said above is intended merely as suggestions supplementing the argument submitted by counsel for the petitioner. By that argument it has been demonstrated that, after the telegraph lines were taken over by the Government, the companies were not, in any sense, operating them; that such companies could not be subject to suit for the acts or omissions of the employees who had become employees of the Government; and that no act of Con-

gress has subjected the Government to such liabilities as are sought to be enforced in this case, or designated the telegraph companies as agents in whose name the Government, may be sued or on whom process may be served for the purpose of enforcing a liability which, if enforced, must be discharged by the Government.

It is respectfully submitted that there is no authority for such a suit as this and that the judgment of the Supreme Court of the State of South Carolina should be reversed.

WILLIAM L. FRIERSON,
Solicitor General.

SEPTEMBER, 1920.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 293.

WESTERN UNION TELEGRAPH COMPANY,
PETITIONER,

v.

S. B. POSTON.

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF STATE
OF SOUTH CAROLINA.**

BRIEF OF THE RESPONDENT, S. B. POSTON.

This was a suit at law by S. B. Poston, a citizen of South Carolina, against Western Union Telegraph Company, instituted in the proper court of the State of South Carolina, for damages for negligent delay in transmitting and delivering a series of intrastate messages relating to the sale of cotton.

The defendant below, petitioner here, in its answer pleaded non-liability because of the Government supervision, control, possession, and operation pursuant to joint resolution of Congress and the presidential proclamation.

The issues made by the pleadings were submitted to a jury, which found a verdict for plaintiff. From judgment thereon an appeal was prosecuted to the Supreme Court of the State, which affirmed the judgment of the lower court by an opinion in part as follows:

"The first question that will be considered is whether there was error in the ruling of his honor the presiding judge that the action was properly brought against the defendant, Western Union Telegraph Company.

"The appellant's attorneys rely upon the joint resolution of Congress, which was adopted on the 16th of July, 1918; the proclamation of President Wilson on the 22d of July, 1918; the order made by Postmaster General Burleson, on the 1st of August, 1918; and on the contract between the Western Union Telegraph Company and the Postmaster General, dated the 9th of October, 1918, which were introduced in evidence by the defendant.

"The joint resolution of Congress authorized and empowered the President of the United States to take possession and control of all telegraph systems, and to operate them in such manner as to him might seem needful or desirable, provided that just compensation should be made for such supervision, possession, control, or operation, to be determined by the President.

"In the President's proclamation he made the following order:

"It is hereby directed that the supervision, possession, control, and operation of such telegraph and telephone systems, hereby by me undertaken, shall be exercised by and through the Postmaster General, Albert S. Burleson. The said Postmaster General may perform the duties hereby and hereunder imposed upon him so long and to such extent and in such manner as he shall determine, through the owners, managers, boards of directors, receivers, officers, and employees of said telegraph and telephone systems. Until and except so far as said Postmaster General shall, from time to time, by general or special orders, otherwise provide, the owners, managers,

boards of directors, receivers, officers, and employees of the various telegraph and telephone systems shall continue the operation thereof in the usual and ordinary course of the business of said systems, in the name of their respective companies, associations, organizations, owners, or managers, as the case may be.'

"The following provisions are in the order made by the Postmaster General:

"Pursuant to the proclamation of the President of the United States, I have assumed possession, control, and supervision of the telegraph and telephone systems of the United States.

"Until further notice, the telegraph and telephone companies shall continue operation in the ordinary course of business, through regular channels. All officers, operators, and employees of the telegraph and telephone companies will continue in the performance of their present duties, reporting to the same officers as heretofore and on the same terms of employment.'

"The following provision is in the contract between the Western Union Telegraph Company and the Postmaster General:

"The Postmaster General shall pay, or save the owner harmless from, all expenses incident to or growing out of the possession, operation, and use of the property taken over during the period of Federal control. He shall also pay, or save the owner harmless from, all judgments or decrees that may be recovered or issued against, and all fines and penalties that may be imposed upon it, by reason of any cause of action arising out of Federal control, or anything done or omitted in the possession, operation, use, or control of its property, during the period of Federal control, except judgments or decrees founded on obligations of the owner to the Postmaster General of the United States.'

"While the action and the judgment therein recovered are in form against the Western Union Telegraph Company, yet in effect they are against the Postmaster General.

"The plaintiff followed the mode of procedure directed by the President in his proclamation and or-

dered by the Postmaster General, not only in his order hereinbefore mentioned, but also when he ratified the contract between the Western Union Telegraph Company and himself, which contemplated a judgment in form against the defendant, Western Union Telegraph Company.

"As judgments recovered in actions, in form, against the telegraph companies are to be paid by the Postmaster General, it cannot be successfully contended that the recovery in this case will deprive the defendant of its property without due process of law."

The petitioner then procured a writ of certiorari from this court to review that decision.

The sole question, then, for the consideration of this court may be stated thus:

Can an action at law for damages be maintained against the Western Union Telegraph Company for negligence in handling a private message during the period of Federal control?

In suggesting an affirmative answer to that question and an affirmance of the lower court, we conceive it unnecessary to cite and discuss the great number of State and inferior Federal courts' decisions, since the question to be determined depends upon a consideration of only four documents:

First. Joint resolution of Congress, adopted July 16, 1918 (40 Stat., 904, c. 154).

Second. Proclamation of the President, dated July 22, 1918.

Third. General Order No. 1783, dated August 1, 1918.

Fourth. Contract between the Postmaster General, for the Government, and the Western Union Telegraph Company, dated October 9, 1918, but dating back to August 1, 1918, by express stipulation.

From a consideration of these four documents the question must receive its answer.

The power of Congress to pass the joint resolution must be conceded; but, if not, this court has settled that question beyond the point of further controversy in the Dakota rate cases, in the following words:

"That under its war power Congress possessed the right to confer upon the President the authority which it gave him we think needs nothing here but statement, as we have disposed of that subject in the North Dakota Railroad rate case. And the completeness of the war power under which the authority was exerted and by which completeness its exercise is to be tested suffices, we think, to dispose of the many other contentions urged as to the want of power in Congress to confer upon the President the authority which it gave him."

Dakota Cent. Tel. Co. v. St. of S. Dakota, 39 Sup. Ct. Rep., 507.

If Congress had the power and acted under it, it follows that the action of the President in taking over the wire and radio systems under the joint resolution and his proclamation must be read as a part of the joint resolution with equal force and effect.

The joint resolution was predicated upon the making of just compensation to the systems taken over, and conferred upon the President plenary power in this respect, leaving the matter to him for ascertainment and adjustment without any limitations or restrictions to guide or hamper him.

The President exerted the power thus given by proclamation, dated July 22, 1918, wherein he says:

"It is hereby directed that the supervision, possession, control, and operation of such telephone and telegraph systems hereby by me undertaken shall be exercised by and through the Postmaster General."

"The proclamation gave to the Postmaster General plenary power to exert his authority to the extent he might deem desirable through the existing owners, managers, directors or officers of the telegraph or

telephone lines, and it was provided that this service might continue as permitted by general or special orders of the Postmaster General. It was declared that:

"From and after twelve o'clock midnight on the 31st day of July, 1918, all telegraph and telephone systems, included in this order and proclamation shall conclusively be deemed within the possession and control and under the supervision of the said Postmaster General without further act or notice."

"Under this authority the Postmaster General assumed possession and control of the telephone lines and operated the same. On the 31st day of October, 1918, the President, through the Postmaster General, in the exertion of the duty imposed upon him by the resolution of Congress, to make compensation, concluded a contract with the telephone companies, of the most comprehensive character, covering the whole field while the possession, control and operation by the United States continued. By its terms stipulated amounts were to be paid as consideration for the possession, control, and operation by the United States and the earnings resulting from such operation became the property of the United States. Although concluded in October, 1918, by stipulation the contract related back to the time when the President took over the property."

Dakota Cent. Tel. Co. v. State of South Dakota, supra.

From the foregoing quotation, taken from a decision of this court considering the same documents which we invoke to sustain our contention, it would seem that the action of the Postmaster General has been by this court declared to be the action of the President, and that the action of the President is under and in conformity or, as we contend, of like force as if a part of the joint resolution.

As was said by District Judge Jack; in the District Court for the Southern District of Texas, in the case of Southwestern Telegraph and Telephone Company *v.* City of

Houston *et al.*, reported in 256 Federal Reporter, 690, on page 698:

"The President, acting through the Postmaster General, may or may not have made a good contract. The authority to enter into such a contract involved the exercise of his own judgment, and where such discretion is vested in the President, the courts have no authority to inquire whether or not he acted wisely or to the best advantage. They may not substitute their judgment for his.

"As was said by the Supreme Court as far back as *Marbury v. Madison*, 1 Cranch, 137; 2 L. Ed., 60:

"By the Constitution of the United States, the President is vested with certain important political powers in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.'

"In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive.'

"The court, in the same case, recognized the distinction in cases where the representative of the President acts in a matter requiring the exercise of discretion, and where his duties are purely ministerial:

"The conclusion from this reasoning is that, where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where his specific duty is assigned by law, and individual rights depend upon performance of that duty,

it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy.'

"The latest expression of the Supreme Court on the subject is in *Louisiana v. McAdoo*, 234 U. S., 633, 34 Sup. Ct. 941; 58 L. Ed., 1506, in which the court says:

"There is a class of cases which holds that if a public officer be required by law to do a particular thing, not involving the exercise of either judgment or discretion, he may be required to do that thing upon application of one having a distinct legal interest in the doing of the acts. Such an act would be ministerial only. But if the matter with respect to which the action of the official is sought is one in which the exercise of either judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that of the official intrusted by law with its execution. Interference in such a case would be to interfere with the ordinary functions of government. *Marbury v. Madison*, 1 Cranch, 137 (2 L. Ed., 60); *Kendall v. United States*, 12 Peters, 524, 610 (9 L. Ed., 1181); *United States v. Schurz*, 102 U. S., 378 (26 L. Ed., 167), are examples of instances where the duty was supposed to be ministerial. Cases upon the other side of the line are *Decatur v. Paulding*, 14 Peters, 497, 514, *et seq.* (10 L. Ed., 559, 609); *Mississippi v. Johnson*, 4 Wall., 475 (18 L. Ed., 437); *Cunningham v. Macon, etc., Railroad*, 109 U. S., 446 (3 Sup. Ct., 292, 609; 27 L. Ed., 992); *United States ex rel. Dunlap v. Black*, 128 U. S., 40 (9 Sup. Ct., 12; 32 L. Ed., 354); *United States ex rel. v. Lamont*, 155 U. S., 303 (15 Sup. Ct., 97; 39 L. Ed., 160); *Roberts v. United States*, 176 U. S., 221 (20 Sup. Ct., 376; 44 L. Ed., 443); *Riverside Oil Company v. Hitchcock*, 190 U. S., 316 (23 Sup. Ct., 698; 47 L. Ed., 1074); *Ness v. Fisher*, 223 U. S., 683 (32 Sup. Ct., 356; 56 L. Ed., 610)."

Therefore, upon the very excellent reason and authority before cited, we make bold to suggest to this court that the

contract and order of the Postmaster General be considered as if they were embodied in the presidential proclamation, and that the proclamation be read as if a part of and embodied in the joint resolution; and when we view the situation and read the documents from this point we cannot but feel that the 128-page brief of the petitioner is but a fine-spun web of meaningless legal verbosity, tautological and specious.

This court, in the Dakota Telephone rate case, *supra*, has said:

"The President, * * * concluded a contract with * * * the companies of the most comprehensive character, covering the whole field."

The President, by General Order No. 1783 (folio 57) directed:

"Until further notice, the telegraph and telephone companies shall continue operation in the ordinary course of business through regular channels" * * * "All officers, operators, and employees of the telegraph and telephone companies will continue in the performance of their present duties, reporting to the same officers as heretofore and on the same terms of employment" * * * "No changes will be made until after the most careful consideration of all the facts."

Continuing operation in the *usual course*, by the same operatives, *without change*, comprehended the continuation of the right of the public to contract for the transmission and delivery of private messages as theretofore, with the rights as theretofore existing for breach of contract.

This court, in referring to the contract, by the use of the words "most comprehensive character, covering the whole field," has, in effect, so held, and it must follow from the very necessity of the thing, as well as from the relevant and pertinent provisions of the contract on this point, that such is the case.

As was said by District Judge Foster in the District Court for the Eastern District of Louisiana, at New Orleans, in the case of *Witherspoon v. Postal Tel. Co.*, 257 Fed. Rep. 758, on page 759:

"The proclamation directs that the supervision, possession, control, and operation of the telegraph and telephone systems shall be exercised by and through the Postmaster General, and that the said Postmaster General may perform his duties through the owners, managers, board of directors, receivers, officers, and employees of said telegraph and telephone systems. The proclamation further provides that the—

"Employees of the various telegraph and telephone systems shall continue the operation thereof in the usual and ordinary course of the business of said systems, in the names of their respective companies, associations, organizations, owners or managers, as the case may be."

"Neither in the joint resolution nor the proclamation of the President is there a provision similar to section 10 of the act of March 21, 1918, c. 25, 40 Stat., 456 (Comp. St. 1918, §3115^{34j}), taking over the railroad systems of the country. It seems to me, however, that it was the intention of Congress, in authorizing the President to take over the lines, that the companies should go ahead with private business the same as theretofore. This would contemplate the institution and defense of suits. If the company is allowed to take and send private messages, there should be some method of holding it liable for damages occasioned through negligence, notwithstanding the Postmaster General had the direction and control of the company. See *Postal Tel. & Cable Co. v. Call*, Dist. Judge, 255 Fed., 859, — C. C. A., —.

"The joint resolution provides for just compensation to the companies and the method of settling disputes as to same between them and the Government. If the companies are held for damages occasioned while under Government control, compensation will certainly extend to reimbursement."

We cite these pronouncements of the judges of the district courts, not as authority, but for the excellence of the reasoning therein set forth; and when we view their opinions in the light of the conditions then existing and of the four cardinal and primary documents upon which the rights of the public depend, we cannot but feel that they are wise, just, and in accordance with law.

Let us look for a moment at the conditions existing in July and August, 1918:

Our country was engaged in mortal combat with a powerful and unscrupulous enemy, whose system of espionage and sabotage was so well organized and so extensive that it was vitally necessary to the protection of the country and the winning of the war that the Government should supervise the means of rapid dispatch and transmission of intelligence, to censor the same and prevent them being put to unlawful and harmful use by enemies in our midst.

Government control was rendered necessary for the further reason that State secrets of the utmost importance were being flashed across the wire from official to official, and it was indispensably necessary that these secrets should remain inviolate, and there was no other means than Government supervision to positively insure this protection.

This supervision was made necessary in order to give preference to Government messages, any delay of which might have caused irreparable and untold damage, loss, and confusion.

And as the war was one of resources and wealth as well as one of men and munitions, the item of revenue to the Government from the operation was not a negligible consideration.

These, in brief, we apprehend, were the compelling motives to the passage of the joint resolution and the action of the Chief Executive in exerting the power conferred upon him, from the standpoint of the Government, considered as such. But there were other motives and ideas underlying and in-

extricably involved therewith, and among them may be mentioned the vital necessity of not only maintaining private and corporate enterprise, productivity, and commerce at its highest efficiency, but even of increasing the efficiency thereof by unifying and operating these basic and fundamental necessities of our complex industrialism as a national system as a means to winning the war.

We gather so much from the public documents on the subject and from the expression of learned judges, State and Federal, who have discussed the same in their printed opinions.

If, then, among other things, the Government was operating the wire systems for profit and with a view to increasing the efficiency thereof, in the usual course, through the same corporate entities, instrumentalities, and operatives, without change, it must needs follow that the all-embracing, comprehensive contract, covering the whole field, contemplated contracts for transmission and delivery of private messages, and necessarily compensation for damages caused by negligence. Any other conclusion, we deferentially submit, would impute to the Chief Executive a callous disregard for the rights of citizens which would be unjustifiable from any angle or from any public or private act of his and would be a reproach on the Government, which in its entire history has never, and we fondly hope and believe will never, assume such an attitude.

The contract itself, comprehensive and all-embracing, covering the whole field, as it does, proposed by the petitioner, accepted by the Government, and offered in evidence in this case, in so many words covers the point in controversy:

Among other things, this contract provides (section 8, paragraph E, folio 7):

"The Postmaster General shall pay or save the owner harmless for all expense incident to or growing out of the possession, operation, and use of the property taken over during the period of Federal control.

He shall also pay or save the owner harmless from all judgments or decrees that may be recovered or issued against, and all fines or penalties that may be imposed upon, it by reason of any cause of action arising out of Federal control or anything done or omitted in the possession, operation, use or control of its property during the period of Federal control, except judgments or decrees founded on obligations of the owner to the Postmaster General of the United States."

Paragraph 8, section F, folio 67 :

"The Postmaster General shall save the owner harmless from any and all liability, loss, or expense resulting from or incident to any claim made against it, growing out of anything done or omitted during the period of Federal control, in connection with or incident to operations or existing contracts relating to operations, and shall do and perform, so far as is requisite, during the period of Federal control, for the protection of the owner, all and singular the things of which he may have notice, necessary and appropriate to prevent, because of Federal control or by reason of anything done or omitted thereunder, the forfeiture or loss by the owner of any of its property rights, ordinance rights or franchises or of its connecting or other contracts involving a facility of operation."

There is nothing in the contract anywhere to modify this provision in the very least. The purpose, above adverted to, to obtain which the wire systems were taken over, the high regard manifested and oft repeated in the public documents on the subject for public and private rights and the whole tenor, true intent and meaning of this contract, containing the above-quoted provisions, is consistent therewith and shows that the parties thereto had in mind and intended to settle the things therein set forth and for which we contend here in this court.

The contract provides in terms that the Postmaster General shall pay or save the owner harmless from all judgments and

decrees recovered against it by reason of any cause of action arising out of Federal control, or any act done or omitted during Federal control.

There is no qualification to the term "judgments" or "decrees."

There is no one court or set of courts, State or Federal, designated or specified wherein these judgments or decrees which the Postmaster General is to pay or save the petitioner harmless from are to be recovered or issued.

There is no limitation or qualification as to the nature of the cause of action upon which the judgment may be recovered or decree issued, and, on the contrary, the terms are broad and all-inclusive—"anything done or omitted."

There is but one class of judgments and decrees excepted, and those are founded on obligations of the owner to the Postmaster General or the United States.

The words of the contract are broad, all-inclusive, clear, and unequivocal. They authorize suit by the plaintiff below or any other citizen in any court in the land, State or Federal, where the petitioner has an office for "any act done or omitted" during the period of Federal control.

This contract was proposed by the petitioner when it was already being operated by the Government, *in the usual course, without change*, and intended to be *most comprehensive, and to cover the whole field*, and it cannot now be heard to say that the plain, simple, untechnical, unambiguous words used therein, when read in the light of the proclamation of the President, do not mean what they say.

Let us suppose that the joint resolution of Congress had provided:

That the President do take over the wire systems of the country and operate the same during the period of the war through the existing corporate entities, instrumentalities, and operatives, in the usual course, without change, except as he may from time to time make by general or special order, and that the Government would pay and save harmless the wire

companies from all judgments and decrees rendered against them or any of them by reason of any cause of action arising out of anything done or omitted during the period of Federal control.

This court, we apprehend, would immediately say that thereunder the wire companies would suffer the action in the present case, defend it, and upon payment of the judgment the Government would be in honor and law bound to pay the same, with all reasonable expenses incurred in defending the same.

This much we contend has been done, but by an instrument which is not open to attack as being unconstitutional, a solemn contract, voluntarily entered into and proposed by the petitioner, and which the petitioner cannot be heard to say deprives it of its property without due process of law; nor can it say, we respectfully submit, that it denies it or the Government the equal protection of the law.

Suppose, if the court please, that the petitioner, having defended and lost this suit, should present the Government with a transcript of the record, a receipt for the judgment paid, and a bill of the expense, and the Government should refuse to pay; then, under the terms of the joint resolution and the contract, the petitioner could sue the Government and recover over, and there would be no uncertainty or chance of loss involved therein; for, as a Government instrumentality it was being operated; as a government instrumentality it was making a profit for the Government; as a Government instrumentality it was sued; as a Government instrumentality it paid, and as a Government instrumentality it would be entitled to just compensation under the joint resolution and contract.

The Government has the right to appoint a representative to defend for it and to pay judgments rendered against its representative. So much it did in the case of the railroads. If the Government could appoint Mr. McAdoo to defend

suits and pay judgments for it by congressional and presidential action, why cannot the same Government, by congressional and presidential action, by and with the agreement and consent of the petitioner, as evidenced and expressed in its solemn contract, make and appoint the petitioner its representative for the same purpose? And is not this exactly what has been done?

The contention of the petitioner, when stripped of its surplusage, is merely a denial of this statement and an attempt to give to the plain, simple words used another meaning.

The petitioner cannot deny that the joint resolution left it entirely to the President to determine just compensation. It cannot deny that the President, in taking it over, directed it to continue in business as usual and without change; it cannot deny that it entered into a contract of the most comprehensive character, covering the whole field, designed to carry out the President's determination of just compensation for its operation as usual and without change; it cannot deny that a large part of its business and expense consisted of defending suits and paying judgments of this character; it cannot deny that the Government agreed to pay such expense and judgments as a part of the scheme of just compensation, and therefore it seeks to conceal its real contention in a voluminous verbose and tautological argument, fortified by a multiplicity of judicial decisions without a weight of analogy.

The petitioner could certainly sue the Government for clerk hire paid by it during the period of Federal control under the contract. Is that more an item of legitimate expense than the expense of this suit and the payment of this judgment?

The petitioner could certainly sue the Government for any claim it had adjusted for damages during the period of Federal control. Is that more an item of legitimate expense

than the defense of this suit and the payment of this judgment?

Assuming that the court will accept the proposition advanced by the respondent, that the contract for compensation is of the same legal efficacy as if its terms were embodied in the joint resolution, then it may be contended that it is unconstitutional, in that it denies to and deprives the Government of its right to defend suits which are in reality against it, but in form against the petitioner. If the contract were embodied in the joint resolution and it were attacked as being unconstitutional, we submit its terms would defeat the attack, because judgments for damages for unlawful acts would be an item of operating expense as necessarily incident to operation as clerk hire or line maintenance, and if the Government authorized the suit and agreed to repay the petitioner sums paid out by it therefor, and in pursuance thereof the petitioner paid and the Government refused to repay, at the suit of the petitioner the Government could not deny its liability over. The Government could not make the law, act under the law, accept the benefits, and disclaim its liability for its burdens by asserting (1) that it was denied the equal protection of the law, (2) that its property was taken without due process of law, or (3) that *private* property was being taken without compensation. However, the fact is the Government makes no such contention. It is not the Government, but the petitioner, before the court, and it suggests:

(1) There could be no liability against the petitioner unless imposed by the joint resolution and the presidential proclamation.

(2) That neither the joint resolution nor the proclamation impose any such liability.

(3) That the United States is the real party in interest and could not be sued in the State court, as it had not con-

sented thereto, and could be sued in no other place than a district court or the Court of Claims.

(4) That if the joint resolution had made it liable and suable for acts done and omitted during Federal control, it would deprive the petitioner of its property without due process of law.

(5) That the joint resolution, not having imposed liability upon petitioner, the judgment of the State court authorizes the taking of private property without due process of law and denies it the equal protection of the law.

We will discuss its suggestions in the order stated:

1. We do not admit the correctness of this contention, but if it be accepted as sound, then it is rebutted by what we have already said, to the effect that the contract between the petitioner is of equal and even greater strength than if embodied in the joint resolution, and stands upon the same footing in the law as a consent decree or a legislative enactment upon the request of the parties affected.

2. Although the joint resolution does not in terms, on its face, impose any such liability or suability, it leaves it to the President to make just compensation, and he, through his Postmaster General, and the petitioner have stipulated in writing for the payment of judgments so entered against the petitioner, the same as for clerk hire, line maintenance, or any other item of operating expense.

3. The United States is not the real party in interest. It has surrendered its right to so claim by contract authorized by act of Congress, and under and by the same authority and in the same contract it has consented to pay judgments rendered against the petitioner in any court, not having designated or specified any certain or particular court; or, to state it differently, it has consented to be sued in the State courts, if you please, in the name of the petitioner and to pay the judgments rendered therein.

4. The petitioner cannot contend that it is deprived of its property without due process of law if it has to pay this judgment by suggesting that the Government *might* breach its solemn contract, entered into under the authority of an act of Congress; or by suggesting that if the contract had been embodied in the joint resolution, it would have been violative of the Constitution, for while acts of Congress are sometimes declared unconstitutional, not yet have we seen a contract entered into in due form of law, by competent parties, in respect to a lawful subject-matter, declared unconstitutional, and to this extent we submit that the contract is higher and affords more complete protection to the petitioner than if embodied in the joint resolution, and not only binds and precludes the Government, but effectually estops the petitioner.

5. The right of the State court to enforce and protect the rights of its citizens against the petitioner under a contract with the Government authorized by an act of Congress does not take private property without due process of law, nor does it deny to petitioner the equal protection of the law. The burden of the petitioner's argument is this:

If it has to pay this judgment and the Government refused under the contract to repay it, petitioner would then have to produce the respondent and his witnesses and prove its case against the Government in order to enforce payment. The fallacy of this argument is readily apparent by reference to the terms of the contract. If the Government, in breach of the contract, should refuse to repay petitioner the amount expended by it in settlement of this judgment, it could sue the Government, under the joint resolution, upon the contract, and the introduction in evidence of the record of this case would entitle the petitioner to a verdict by direction. If this is true it must be manifest that the suggestions and contentions of petitioner are wholly without merit. The test of the verity of this assertion rests upon the authority of the

President, through his Postmaster General, to make the contract. We think that this authority is abundantly conferred by the joint resolution.

The rate cases decided by this court and many State courts are not inconsistent, but are in harmony with the contention of the respondent. This line of cases but affirms the validity of the joint resolution, proclamation, and contract. They are based upon the reason that if the United States has power to take over the wire systems, it has the exclusive power to regulate the rates and tolls from which to make the compensation and a profit to help win the war. An interference with the Government in establishing new rates to meet the changed conditions would have been tantamount to a declaration that the Government did not have the power to take over and control. These suits were for injunction to restrain a Government official from the performance of a public duty and were necessarily denied for both reasons.

The numerous State and Federal decisions denying citizens the right to sue a wire company for damages, so far as the reported decisions show, were pronounced without consideration of the contract, and especially the provisions above quoted.

It is very evident that the learned discussion which took place in the United States Senate was due to ignorance on the part of the distinguished Senators as to the existence of the contract and its provisions. There are probably many suits now pending of a similar nature.

The justice, the reason, and the necessities of the thing, we submit with all deference, require a decision at the hands of this court affirming the judgment of the Supreme Court of South Carolina.

Respectfully submitted,

PHILIP H. ARROWSMITH,
ALVA M. LUMPKIN,

Attorneys for Respondent.